(2) Supreme Court, U.S.
FILED

No. 98 498 SEP 22 1998

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In The

Supreme Court of the United States

October Term 1998

JAMES L. HOOPER, M.D.,

Petitioner,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A.,

Nominal Respondent,

and

PASQUAL PERRINO, M.D.; STEPHEN DOLINSKY, M.D.; CHARLES KARESH, M.D.; SUSAN WITHROW, M.D.; HERBERT JUARBE, M.D.; CAROLYN BAIER, M.D.; AVANTI OF THE DISTRICT, INC.; SANUS CORP. HEALTH SYSTEMS; SCOTT A. ROTEMAN, t/a., SCOTT A. ROTEMAN, M.D., P.C.,

Respondents.

On Petition for Writ of Certiorari
To The Court of Special Appeals of Maryland

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Stephen A. Armstrong
10335 Democracy Lane
Fairfax, Virginia 22030
(703) 385-4466

Counsel of Record for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

65 pp

TABLE OF CONTENTS
Appendix to the Petition

Opinion of Court of Special Appeals
of Maryland
in *Hooper v. Perrino, et al.*
(July 25, 1997) ..... A. 1

Memorandum and Order of the Circuit Court
of Montgomery County, Maryland
in *Hooper v. Perrino, et al.*,
(July 30, 1996) ..... A. 6

Opinion of the Court of Special Appeals
of Maryland
in *Hooper v. Withrow, et al.*,
(November 30, 1994)..... A. 13

Opinion and Order of the Circuit Court
for Montgomery County, Maryland,
in *Hooper v. Withrow, et al.*,
(January 6, 1994)..... A. 24

Order of the Court of Appeals of
Maryland denying certiorari
in *Hooper v. Perrino, et al.*,
(March 11, 1998) ..... A. 29

Order of the Court of Appeals
of Maryland denying
Motion for Reconsideration
in *Hooper v. Perrino, et al.*,
(June 25, 1998)..... A. 30

Mandate of the Court of Special Appeals
of Maryland reflecting denial of
Motion for Reconsideration
in *Hooper v. Perrino, et al.*,
(December 9, 1997) ..... A. 31

Motion for Reconsideration and
Request for Rehearing In Banc
in *Hooper v. Perrino, et al.*,
filed in the Court of Special Appeals
of Maryland ..... A. 33

Petition for a Writ of Certiorari in
Hooper v. Perrino, et al.,
filed in the Court of Appeals
of Maryland ..... A. 42

Motion for Reconsideration
in *Hooper v. Perrino, et al.*,
filed in the Court of Appeals
of Maryland ..... A. 61

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1517

September Term, 1996

JAMES L. HOOPER

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE, & BAIER, M.D., P.A., et al.

Cathell,
Sonner,
Woodward, Patrick L.
(specifically assigned),

JJ.

Per Curiam

Filed: July 25, 1997
Entered: July 25, 1997

This case arises from the Circuit Court for Montgomery County's (Thompson, J.) dismissal of a

stockholder's derivative action brought to redress alleged fraud on the part of a corporation by its officers and directors. Appellant James L. Hooper, a minority shareholder, sued appellees Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A., its officers and directors (the individual defendants), and the buyers of the P.A.'s assets. Hooper alleged that the P.A.'s officers and directors, in their sale of the corporation's assets, diverted most of the sale price to themselves, thereby misappropriating corporate assets in violation of their fiduciary duties owed to the corporation, and evading state and federal taxes.

The court granted appellees' motion to dismiss on the ground that this action was barred by *res judicata* and collateral estoppel. Judge Thompson concluded that a prior action[1] in the same court before Judge James L. Ryan, brought by Hooper in his individual capacity against the individual defendants, precluded this derivative action. We do not find that the circuit court committed error, and affirm.

The issues presented on appeal are as follows:

1. Is a minority shareholder foreclosed from prosecuting a stockholder's derivative action for the benefit of the corporation, after a prior action, brought in his individual capacity, against individuals who are corporate officers and directors, was dismissed?

2. Do corporate officers and directors who collectively own a controlling interest in a corporation owe fiduciary duties to that corporation as officers and directors?

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[1] Hooper appealed the judgment to this Court, which affirmed the lower court in an unpublished opinion.

We answer the first issue in the affirmative and, as a consequence, do not reach the second issue.

Analysis

In Maryland, the requirements of res judicata are:

> (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute;
>
> (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and
>
> (3) that there was a valid final judgment on the merits.

Major v. First Virginia Bank, 97 Md. App. 520, 533 (1993).

In a case analogous to the case at bar, *Williams v. Messick*, 177 Md. 605 (1940), the court addressed each element of *res judicata*. In *Williams*, a minority stockholder brought a derivative action on behalf of the corporation seeking an accounting from the controlling stockholder for alleged "waste and spoilation." The same stockholder had previously brought an unsuccessful direct suit against the corporation seeking appointment of a receiver in response to alleged "waste and spoilation" on the part of the controlling stockholder. In the direct suit, the court, after an evidentiary hearing, held that the plaintiff had failed to establish that he had a substantive right to have a receiver appointed. The court barred the stockholder from relitigating the same issues that had been dismissed in the first suit, now under the guise of a derivative suit.

In response to the plaintiff's argument that the parties in the second dispute differed from the parties in the first dispute, the *Williams* court stated:

> To draw a distinction between the defense in the name of the [corporation] and the direct defense in this second suit, and to regard the present respondents as strangers or non-participants in the first suit, would seem to constitute too great a disregard of realities, and to relax unjustifiably the rule of fair, orderly, judicature, that there be an end of litigation with one completed proceeding on the same controversy.

Williams, 177 Md. at 614. In this case, Hooper argues that he originally sued in an individual capacity, but is now suing in a representative capacity. This argument, like the argument in *Williams*, disregards the reality that Hooper is the only person to benefit from this suit because he is suing all the other stockholders. He argues that others might benefit from the derivative suit, e.g., "the Corporation's creditors, the Federal and Maryland Governments, and all stockholders." Under Maryland law, however, where directors commit a breach of trust, they are liable to the corporation, not to its creditors or stockholders, and any damages recovered are assets of the corporation. *Waller v. Waller*, 187 Md. 185, 190 (1946). Although creditors or stockholders may benefit as a result of a corporation's increased wealth, they are not parties for the purpose of determining *res judicata*.

The *Williams* plaintiff also argued that the two suits involved a difference in the nature of legal claims. *Williams* at 609. The court found that the differences between the two legal claims were immaterial. Likewise, in the case at bar,

the claims were either already argued or arose from the same transaction.

Finally, the *Williams* court determined that the original suit represented a valid final judgment on the merits. *Id.* at 611. The court distinguished those cases that were first brought by an individual shareholder, dismissed solely on a procedural ground, and then relitigated as a derivative suit. *Id.* at 611. Hooper argues that his first suit was dismissed on a procedural ground, and that the court never reached the merits of his case. Hooper is wrong. In the prior action, Judge Ryan did reach a final judgment based on the merits of the case. He stated that the usual remedy of an individual stockholder for individual damages is the Fair Appraisal Remedy in Md. Code Corps. & Ass'ns Art., Sec. 3-201, *et seq.* In cases of fraud or extreme violation of fiduciary duties, however, alternative relief may be provided. Judge Ryan found:

> In attempting to meet his burden, plaintiff alleges that in transferring MMG's assets, defendants received extraordinary returns at the exclusion of the minority stockholder, Dr. Hooper. This court finds such allegations inadequate to meet the burden of establishing fraud committed by the defendants.

In *Williams*, the court held that the individual shareholder's second suit, brought as a derivative action, was barred by estoppel because the first suit essentially held that she had no right to the proceeding that she sought based on the merits. Likewise, in this case, Judge Ryan found that Hooper was not entitled to an alternative to the appraisal remedy based on the merits. In light of the binding precedent in *Williams*, we affirm the trial court.

JUDGMENT AFFIRMED
COSTS TO BE PAID BY APPELLANT

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, M ARYLAND

JAMES L. HOOPER, M.D.

Plaintiff

v.

PERRINO, DOLINSKY, KARESH,
WINTHROW, JUARBE &
BAIER, M.D. PA. et al.

Defendants.

Civil No. 149861

Filed: July 30, 1996
Entered: July 30, 1996

MEMORANDUM OPINION AND ORDER

This matter is before the court on Defendant's Motion to Dismiss and for Sanctions. The dispute between the parties is long standing with a significant prior litigation history, only part of which is relevant to the instant case. The dispute arises out of the discharge of the plaintiff from a collective medical practice in which the plaintiff continued to retain his voting stock.[1] In 1993, the remaining principals of the corporation variously known as the Montgomery Medical Group, P.A. or MMG (hereinafter "MMG") decided to sell the assets of MMG. The principals sought and found a buyer. This buyer has also been sued in this action. The essence of the buyout procedure was that an appraisal was

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[1] The struggles of the parties in the instant case are a textbook example of the necessity for an effective buy-sell agreement in the information and continuation of professional practices.

made of the assets and a price was negotiated with the buyers of the practice. Plaintiff, in this suit, complains in various counts that MMG has been damaged by the nature of the sale negotiation. The agreement eventually reached contained subsequent employment contracts for the principals of the corporation, including non-competition provisions of an allegedly too-lucrative nature and inflated salaries in lieu of monies which, it is claimed, should have passed to the corporation. The suit, brought on behalf of the corporation and shareholders seeks damages on behalf of MMG and, ultimately, equitable relief in the form of dissolution of the corporation and distribution to the shareholders of its then-existing assets.

There has been previous litigation between the plaintiff and some of the current defendants in the United States District Court for the District of Maryland, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. This litigation resulted in the dismissal of substantially all of the plaintiff's claims on the basis that there was an adequate remedy in state court.

Not easily dissuaded, plaintiff once again pursued his complaints against the corporate principals in the Circuit Court for Montgomery County, Maryland. By the time of this action, MMG had not only discharged the plaintiff, it had entered into the sale agreement previously described. Plaintiff attempted to derail the sale transaction by filing an injunctive action which was heard and denied on an ex parte basis. Plaintiff then elected to voluntarily non-suit the matter.

Thereafter, once again, the plaintiff attempted to bring an action in the Circuit Court, styled as *James L. Hooper v. Susan Withrow, M.D. et al.*, Civil No. 111401. In this suit, plaintiff alleged breach of fiduciary duty, fraud, conversion, and conspiracy by the actions of his former compatriots in the medical practice. After argument on a motion to dismiss, the Honorable James Ryan of the Circuit Court issued an opinion to the effect that the motion to

dismiss would be granted because the remedy of fraud, under the scenario presented in the complaint, did not reach the necessary level to qualify for the exception contained in the appraisal rights statute. Normally, there is an iron clad requirement that, during the course of a sale or merger of a corporation, the rights of a dissenting stockholder are to be governed by the appraisal rights statute found at Maryland Annotated Code, Corporations and Associations Article, Sec. 3-201 through Sec. 3-213. Where there is fraud of a certain level, however, the complaining shareholder may void the appraisal right strictures of the Corporate Code and proceed directly to Circuit Court. This determination, that the "fraud exception" had not been reached, is what Judge Ryan decided. In so ruling, as evidenced by his opinion, Judge Ryan considered the other aspects of the complaint filed within the case.

Judge Ryan's initial decision was subsequently appealed to the Court of Special Appeals which, after argument, rendered a per curium opinion on November 30, 1994 affirming the trial court.[2]

In this action, plaintiff sues on behalf of himself, the other stockholders and the corporation in a derivative suit. The complaint is styled in nine counts alleging breach of fiduciary duty by the directors and officers, conversion, fraud, injurious falsehood, conspiracy, constructive fraud, negligent misrepresentation, negligence and a request for equitable relief in the form of a corporate dissolution.

As a condition precedent to most derivative lawsuits, demand must be made upon the officers and directors, often referred to as "demand on the board," seeking a self-correction of the allegedly injurious actions and protection of the interests of the stockholders. Derivative actions are brought when it is claimed that the actions of the officers and directors are in conflict with that which is in the best interests of the corporation. Upon inquiry, it is argued (and

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[2] *James L. Hooper v. Susan Withrow et al.*, No. 169, September Term, unreported.

not disputed) that the required demand on the Board would have been futile where the defendants had allegedly acted for their personal benefit and could not be expected to change the corporate decision to sell under the previously discussed terms and conditions.

The defendants' current motion to dismiss this new "derivative" suit, relies primarily upon an asserted res judicata or collateral estoppel defense, allegedly arising by way of the earlier circuit court litigation. The res judicata defense is posited notwithstanding the fact that the new action is styled as a "derivative action" and, therefore, theoretically not one for the benefit of the individual plaintiff. Thus it is a threshold question as to whether the two circuit court actions are truly the same suit or are essentially separate causes of action.

Under the facts as set forth in the two actions, the central theme of each is alleged fraud by the officers and directors in derogation of the interest of the plaintiff. By its clear terms, if the plaintiff's requested relief is granted, the only person or entity that will benefit in any way is the plaintiff. This is surely true if the officers and directors, constituting all of the remaining stockholders of the corporation, are required to pay over to the corporation some form of damages, and the corporation is then dissolved and its assets distributed to all stockholders. The plaintiff in that situation would be the only stockholer to see any gain. It is the same relief for which the plaintiff prayed in Civil No. 111401 in the counts alleging comparable causes of action.

A case cited by both sides to this action, *Williams v. Messick*, 177 MD. 605 (1940), is particularly helpful in the analysis of the instant issues. In *Messick*, the complainant had previously brought an action as a minority stockholder, for the benefit of the corporation, complaining of waste and spoilation by the majority stockholder and company officer. This action was dismissed. The complainant then sued the company and majority stockholder for essentially the same

relief prayed in the original action.[3] In *Messick*, as in the instant case, the differentiation between two suits was in their legal theory, the identity of the defendants and the nature of the obligations asserted. In essence, the sequence of events in *Messick* is the reverse of that in the instant case, the derivative action in *Messick* having been filed first and the direct action second. One of the holdings of Messick is that "a difference in the grounds advanced for accomplishing the same relief in two successive suits would not prevent the operation of the decree in first suit as an estoppel for the purpose of the second suit." *Messick, supra*, at p. 612. In other words, if a party has a choice between two actions seeking the same goal or relief, and he selects one over the other and the one chosen is decided by a competent tribunal, either for or against him, he will not be permitted to resort to the other. If the practical relief sought by the plaintiff is of the same effect under both suits, they cannot be said to be different. Essentially, in the same instant case, the plaintiff is seeking the same relief as that sought in Civil No. 111401, namely, restoration to his use of the monies allegedly diverted from the corporation.

Having determined that the nature of the proceedings are the same, plaintiff claims that he is still entitled to his day in court on the fraud count, it not having fully litigated in the first suit. An examination of the opinion of Judge Ryan shows that when the "value" or "price" of the transaction is questioned by a dissenting stockholder, the remedy of appraisal rights is not exclusive. As discussed above, fraud may be alleged under certain limited circumstances. This narrow exception was examined by Judge Ryan and the plaintiff's complaint was found to be lacking in its allegations.

In the instant case, fraud in several form is once again alleged, albeit in a more complete form. Still, the alleged

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[3] The second complaint in *Messick, supra*, included an additional averment relating to the value of the book accounts of the company in which the complainant was a minority stockholder.

fraud perpetuated by the defendant officers and directors upon the corporation, for whom they speak and act as officers and directors, is nonsensical. This argument requires an exercise of mental gymnastics necessary to separate and distinguish the roles of the defendants as defendants from that of the defendants as the corporation in order to understand the theory of the plaintiff's complaint. Such an argument can only succeed with a total disregard for reality. Fraud requires the misleading of persons who have somehow justifiably relied. The defendants, acting as the corporation, cannot possibly be found to have relied on supposedly fraudulent statements made by the defendants as defendants to themselves when occupying the role of defendants as the corporation. Outside of delusions and the like, it is impossible for one to lie to oneself in a convincing enough manner that any court would find "reliance" upon the lie.

The counts relating to fraudulent breach of fiduciary duty, conversion, general fraud, and constructive fraud must fail for that reason, but for reasons different from those allegations in Civil 111401. In both suits, the allegations of the complaint have been considered and are not of the type that form the basis for an exception to the application of the appraisal rights rule. The remaining counts also require dismissal as they do not fall within the fraud exception.

The claim by the plaintiff that he has never been able to litigate the issues of fraud begs the issue. The plaintiff is only entitled to litigate fraud if it rises to a level sufficient to qualify as an exception which would then permit the litigation. As stated above, this case involves the same causes of action previously found inadequate by Judge Ryan. The test is whether the issue of appraisal rights was fully considered. Since the answer is in the affirmative, there is no other alternative but to find that the application of res judicata and/or collateral estoppel is proper.

Accordingly, it is by the Circuit Court of Montgomery County, Maryland, this 29th day of July, 1996,

ORDERED that the Defendants Motion to Dismiss be, and is hereby GRANTED WITHOUT LEAVE TO AMEND.

/s/_____
Durke G. Thompson,
Judge of the Circuit Court

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 169

SEPTEMBER TERM, 1994

JAMES L. HOOPER

v.

SUSAN WITHROW *et al.*

Wilner, C.J.,
Bloom,
Smith, Marvin H.
(retired, specially assigned),

JJ.

Per Curiam

Filed: November 30, 1994
Entered: November 30, 1994

Appellant, James L. Hooper (Hooper), and appellees, Susan Withrow *et al.* (Withrow), are all of the stockholders of a professional service corporation known as Montgomery Medical Group, P.A. (Montgomery Medical). Hooper sued

Withrow in the Circuit Court for Montgomery County, alleging breach of fiduciary duty, fraud, conversion, and conspiracy, stemming from a proposed sale of the assets of Montgomery Medical. The latter two counts were voluntarily dismissed before the court ruled on the motion to dismiss. A motion to dismiss was granted. This appeal followed. We shall affirm.

Hooper started the medical practice in question and later took in other stockholders. He currently owns 50 of the outstanding 325 shares of stock; Withrow owns the remaining 275 shares. Withrow ousted Hooper as a director. The remaining stockholders are all of the directors. Withrow subsequently entered into negotiations with Avanti of the District, Inc. (Avanti) for the sale of all of the assets of Montgomery Medical.

Maryland Code (1975, 1993 Repl. Vol.) § 3-105(b) of the Corporations and Associations Article provides that, when a corporation proposes transferring its assets, its board of directors shall "[a]dopt a resolution which declares that the proposed transaction is advisable on substantially the terms and conditions set forth or referred to in the resolution;" and "[d]irect that the proposed transaction be submitted for consideration at either an annual or a special meeting of the stockholders."[1] The notice shall state "that a purpose of the meeting will be to act on the proposed . . . transfer of assets . . . ." Section 3-105(c). Such "transfer shall be approved by the stockholders ... by the affirmative vote of two thirds of all the votes entitled to be cast on the matter." Section 3-105(d). Section 1-102(a) states, "Except as otherwise expressly provided by statute, the provisions of this article apply to every Maryland corporation and to all their corporate acts."

A meeting of Montgomery Medical's stockholders was duly called and the stockholders (except for Hooper) voted to sell all of the assets for the sum of $1.5 million

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[1] Henceforth, all citations to statutes are to Maryland Code (1975, 1993 Repl. Vol.) Corporations and Associations Article.

dollars to Avanti. In his Complaint, Hooper alleged that Withrow procured contracts of employment for substantially increased salaries as part of the sale. These salaries are said to be "approximately one fifth to one third higher than salaries being paid by the purchasers to other comparably qualified physicians" who "do not receive the bonuses being paid to [Withrow]." Hooper further alleged that these increases in salaries and these bonuses "represent a substantial portion of the value of the assets of [Montgomery Medical] ...."

Where, as in this case, there is a transfer of assets requiring corporation action under § 3-105, § 3-202(a) grants a stockholder "the right to demand and receive payment of the fair value of stockholder's stock from the successor . . . ." Section 3-203 sets forth the procedure to be followed by the stockholder. Section 3-208 provides for a petition to a court of equity for the appointment of appraisers. Section 3-210 sets forth the appraisal procedure. Section 3-211 sets forth the action to be taken by the court on the appraiser's report.

Withrow suggested, and the trial court found, that the appraisal provisions were applicable. The judge stated, "[Hooper's] concerns that the alleged bonuses and exorbitant salaries received by [Withrow] are actually in consideration for transferring the assets of [Montgomery Medical] will be fully evaluated. If the allegations turn out to be true, Dr. Hooper will receive his fair proportion of the sum of money actually paid for the transfer of [Montgomery Medical's] assets."

In ordering the dismissal of the action, the trial judge did not grant leave to amend. Hooper filed a motion for reconsideration and a motion to leave to file a second amended complaint. To this, he appended a copy of that proposed complaint. Withrow contended that the attempt to file a second amended complaint "is clearly improper and impermissible under the Maryland Rules" and asked that the motion be stricken. Reconsideration was denied and the motion for leave to amend was stricken.

We shall discuss Hooper's contentions on appeal seriatim.

I.

Hooper first contends that use of the statutory remedy for appraisal would require a statutorily prohibited sale of stock in a Maryland professional service corporation. This is based upon § 3-212, which provides that the successor is not required to pay for the stock of an objecting stockholder unless simultaneously with payment the certificates representing the stock are surrendered to it, endorsed in blank, and in proper form for transfer; § 3-213(b), which states that after acquiring the stock of an objecting stockholder a successor in a transfer of assets may exercise all of the rights of an owner of the stock; and § 5-113, which provides:

> A stockholder of a professional corporation may not sell or transfer his stock in the corporation except:
>
> (1) To the corporation; or
> (2) To another individual eligible to be a stockholder of the corporation.

Withrow counters that it was never the intent of the parties that Avanti become a stockholder of Montgomery Medical. They point out that an agreement was entered into, a part of the record, "whereby Montgomery [Medical] was required to indemnify the transferees in the event the transferees were required to provide Dr. Hooper with fair value pursuant to the statutory remedy" and that this agreement provides, in pertinent part:

> [I]n the event that a claim or action is asserted which would give rise to indemnification

> hereunder, in consideration of our indemnification of you as described herein, we shall be fully subrogated to your rights, actions, counterclaims, and remedies, including the right, among others, to obtain title to any shares of stock which may be acquired from Dr. Hooper under Sections 3-201 *et seq.* of the Maryland General Corporations Law.

Thus, had Hooper pursued his appraisal remedy, the stock would have been returned to Montgomery Medical or Withrow. Withrow points out that § 5-117 states, "If all stockholders of a professional corporation fail at one time to be licensed in the professional service for which the corporation is organized, the corporation may no longer operate or be treated as a professional corporation, but is to operate or be treated as a corporation under the Maryland General Corporation Law." There is no indication that there was any intent by Montgomery Medical to carry on any professional activities after the sale of assets. Presumably, the corporation would have been liquidated. Further, even if the stock ended up in Avanti's hands, the corporation, under § 5-117, would simply have become a non-professional corporation. We see no merit in this contention of Hooper.

II.

Hooper frames his second question as:

> Whether the sole minority stockholder of a Maryland Professional Service Corporation whose complaint alleges breach of fiduciary duties and fraud by the majority shareholders/officers/directors in the allocation of funds paid for purchase of substantially all of the corporate assets (61%

> paid directly to the officers/directors of the corporation), and conversion through the sale by the corporation of his personal assets, is required to seek relief solely through the statutory appraisal remedy provided in Md. Code. Ann., Corps. & Ass'ns. Art. § 3-201, *et seq.*

A leading case on appraisal, not only in Maryland but elsewhere, is *Homer v. Crown Cork & Seal Co.*, 155 Md. 66 (1928). In *Homer*, Judge Parks stated for the Court:

> The theory of the appellants is that a gross inadequacy of price is accompanied by collusion between two boards of directors, who represent but a single dominant will, in order that the assets of one corporation may become the property of the other at less than half its value through the approval of each corporation by the requisite majority vote of stockholders, who, in both corporations, are under the absolute control of the same dominant will or ownership. If this were the effect of all the allegations of the bill of complaint, the question would not be one of controversy between the majority and minority stockholders over value, in respect to which wide variance in opinion may honestly subsist, but would be one of fraud, which would be peculiarly the province of equity and so take the question out of the statute, since section 36 of the Code contemplates proceedings begun and consummated in good faith and not those infected with fraud. However, to take the bill at bar out of the statute, the fraud must be affirmatively shown, and if, on consideration of all the

> allegations of the bill of complaint, it appears that the fundamental issue thus made is not fraud but a debatable controversy over value in an *intra vires* corporate matter, then the resolution of the difference of opinion of the majority and minority stockholders must be according to the provisions of section 36 of article 23, notwithstanding the unity of interest, control, action, and purpose of the directors and stockholders of both the selling and the buying corporations.

Id. at 80.

In *Schloss Associates v. C&O Railroad Co.*, 73 Md. App. 727, 738 (1988), Chief Judge Wilner said for this Court:

> Plaintiffs, of course, have a different view. Relying principally on *Twenty Seven Trust v. Realty Growth Investors*, 533 F.Supp. 1028 (D. Md. 1982), and *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), they contend that, at least where allegations of fraud, breach of fiduciary obligation, overreaching, or lack of fair dealing are made (and ultimately proved), they are not limited to the payment of fair value, even after the merger is consummated, but may, in the alternative, sue for rescissory or other damages.
>
> On this rather general question, we agree with plaintiffs. Even in States having statutes purporting to make "payment of fair value" an exclusive remedy, the courts have allowed at least injunctive relief under special, compelling circumstances.

The Court added:

> [W]e agree with Judge Miller's analysis in *Twenty Seven Trust, supra*, 533 F.Supp. at 1036, based on pronouncements in *Homer v. Crown Cork and Seal Co.*, 155 Md. 66, 141 A. 425 (1928), and *American General Corp. v. Camp*, 171 Md. 629, 190 A. 225 (1937), that "Nothing in the present appraisal statute . . . or the act from which it is derived . . . indicates that statutory appraisal was intended to be a dissenting shareholder's exclusive remedy in connection with mergers and consolidations under all circumstances. Indeed, *Homer* and *American General* suggest to the contrary."
>
> That conclusion was confirmed in *Lerner v. Lerner*, 306 Md. 771, 511 A.2d 501 (1986), where the Court of Appeals upheld an interlocutory injunction restraining a majority stockholder from proceeding with a "freeze-out" of the minority shareholder through a reverse stock split. Although the case did not involve a merger, much less one under § 3-106, the Court's analysis and conclusion are relevant here.

Id. at 739. The Court then observed:

> This conclusion, that the right to receive fair value does not *necessarily* preclude other relief, is merely a starting point, however. The question, as we indicated, is whether the alternative relief now

sought by the plaintiffs is available to them on the facts pled in this case.

In that regard, it is important to note that injunctive relief is no longer at issue. The plaintiffs lost that effort in the Circuit Court and have neither pursued it nor complained of the loss in this appeal. Although they included in their Consolidated Second Amended Complaint an alternative or contingent request that the B & O–C & O merger be set aside, they do not seem to press for that relief in the appeal but urge only that the defendants are "liable" to them for their (the defendants') allegedly wrongful acts. The relief they seek, it would seem, is in the form of money damages of some sort.

That has a critical significance, especially in light of the cases cited by plaintiffs to support their position. In nearly every case in which a court has allowed a dissenting minority stockholder to pursue relief other than payment of fair value, either the alternative relief allowed was to enjoin or upset the squeeze-out or such relief was unreasonable only because the defendants had successfully concealed the relevant facts until the challenged action had been consummated and could not practicably be set aside. Although we do not take that as necessarily establishing a "*per se*" rule that absolutely forecloses all forms of other alternative relief in *ex post facto* situations, it does at least require a degree of circumspection not apparently recognized by the plaintiffs.

Id. at 740-41.

In Hooper's fraud count, in addition to repeating and realleging the allegations in paragraphs preceding that count, his contentions were confined to:

> 15. The actions of the defendants, and each of them, were intended to defraud, and have defrauded, plaintiff Hooper in the amount of at least $650,000. Said acts were committed deliberately, intentionally, and/or willfully. Said acts were committed with malice.
>
> 16. By reason of the matters set forth above, plaintiff is entitled to recover from defendants, jointly and severally, compensatory and punitive damages, as alleged in paragraph 13 thereof.

This is reminiscent of *Homer*, where the Court said, "An analysis of the bill of complaint makes plain that the basis of the fraud alleged is the charge that the price offered is grossly inadequate." 155 Md. at 81. As in *Schloss*, Hooper is clearly not attempting to set aside the sale of the assets of Montgomery Medical to Avanti or any other type of equitable relief. Rather, the only relief that Hooper is requesting is monetary in nature. Hooper is merely claiming that he did not receive the fair value of his share of the assets of Montgomery Medical. The appraisal is designed to address this very concern. If, as Hooper claims, contracts by Avanti with Withrow "represent a substantial portion of the value of the assets of [Montgomery Medical]," a portion of that value will be assigned to Hooper's shares by the appraiser. Hooper simply wants more money. Other than contending that an appraisal was not available, Hooper fails

to present any reason why an appraisal would not otherwise be sufficient.

III.

The third contention is that the circuit court erred in striking as improper his Motion for Leave to File the Amended Complaint. Our consideration of this point is subsumed in Hooper's fourth contention.

IV.

Hooper finally contends that in his proposed second amended complaint, he set forth a cause of action that the circuit court should have entertained.

Again, we turn to *Homer*, where Judge Parke said for the Court, "Aside from the fraud imputed from the price to be paid, there has been found no well pleaded allegations from which fraud affirmatively appears." 155 Md. at 84. There being no well pleaded allegations, it follows that there was no error in striking the Complaint, even though it may have been struck for the wrong reason.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES L. HOOPER, M.D.

Plaintiff

vs.

SUSAN WITHROW, M.D., et al.

Defendants

Civil Action No. 111401

Entered: January 6, 1994

OPINION AND ORDER

FACTS:

The plaintiff, Dr. Hooper, and all of the named defendants were stockholders in a professional corporation titled Montgomery Medical Group, P.A., (hereinafter "MMG"). The defendants owned 275 of the 325 issued shares of MMG, were all directors of MMG, and some served as officers of MMG. Dr. Hooper owned the fifty remaining shares of MMG, but never served as an officer or director of the professional corporation.

In early April of 1993, the majority stockholders voted to sell all of MMG's assets to Scott A. Roteman, M.D., P.C., a Maryland professional service corporation, and Avanti of the District, Inc., a Maryland general business corporation, over the objection of Dr. Hooper. Subsequently, Dr. Hooper brought this action against the defendants, alleging breach of fiduciary duty, fraud, conversion, and conspiracy. The plaintiff alleges

employment contracts, higher salaries and bonuses were received by defendants from the purchasers of the assets, of which Dr. Hooper received no similar benefits.

In response, the defendants have filed the Motion to Dismiss now at issue.

OPINION:

In support of their motion, defendants assert that Dr. Hooper is merely seeking to receive just compensation for his interest in MMG. All his claims relate to the financial compensation of the defendants for the transfer of assets. Consequently, the defendants argue that plaintiff is bound to seek his grievance under Maryland's fair appraisal remedy, found in Md. Corps. & Ass'ns., Code Ann., §3-201 through §3-213. Under that statute, a complaining stockholder such as Dr. Hooper may petition the Circuit Court to appoint three neutral appraisers to determine the fair value of the stock in question. Md. Corps. & Ass'ns., Code Ann., §3-210 states, in pertinent part:

> (a) Court to appoint appraisers — If the court finds that the objecting stockholder is entitled to an appraisal of his stock, it shall appoint three disinterested appraisers to determine the fair value of the stock on terms and conditions the court considers proper. Each appraiser shall take an oath to discharge his duties honestly and faithfully.

The plaintiff counters that this remedy is not viable in the present situation. He argues that to obtain fair value for his stock under this statute, he would have to transfer his stock to the successor corporations. Dr. Hooper points out that since the stock in question relates to a professional corporation, he is limited to whom he may transfer the stock. Md. Corps. & Ass'ns., Code Ann., §5-113, provides that:

"A stockholder of a professional corporation may not sell or transfer his stock in the corporation except:
(1) To the corporation; or
(2) To another individual eligible to be a stockholder of the corporation."

Therefore, according to Dr. Hooper, he could not transfer his stock to the successors because they both are corporations not licensed to practice medicine in the State of Maryland, and thus not eligible to receive the stock.

However, according to the transfer agreement between the defendants and successor corporations, the successors were to turn the stock over to the licensed defendants, and then be indemnified by them. Consequently, since the stock would be transferred to eligible recipients, Md. Corps. & Ass'ns., Code Ann., §5-113 does not act as a bar to the fair appraisal remedy for Dr. Hooper.

Next, plaintiff correctly argues that the statutory appraisal remedy is not the sole form of relief available. As the Maryland Court of Special Appeals has stated, "[n]othing in the present appraisal statute . . . or the act from which it is derived . . . indicates that statutory appraisal was intended to be a dissenting shareholder's exclusive remedy in connection with mergers and consolidations under all circumstances." *Schloss Associates v. C & O RY*, 536 A.2d 147 (Md. App. 1988) quoting from *Twenty-Seven Trust v. Realty Growth Investors*, 533 F. Supp. 1028 (1982).

While this remedy is available, it is not liberally administered. "As to whether, and under what circumstances, a monetary remedy grant from payment of fair value and the statutory appraisal process is available . . . [s]uch a remedy is available, if at all, under very limited circumstances." Id. In order to avail an alternative form of relief, a plaintiff must allege, as relevant to the facts here, that there was substantial fraud.

> In the successful injunction or rescission cases, the common complaint is that . . . (4) there has been some kind of fraud or *extreme* violation of fiduciary duties by the majority stockholder or the officers or directors of the corporation in the timing or structure of the proposed action that go beyond merely the price to be offered for the minority shares. It is when faced with substantial and specific averments (or proof) of this type that courts have found the right to payment of fair value inadequate and therefore non-exclusive. It is in this type of setting that courts have invoked their traditional and more general equity powers." Id. (emphasis supplied)

In attempting to meet this burden, plaintiff alleges that in transferring MMG's assets, defendants received extraordinary returns at the exclusion of the minority stockholder, Dr. Hooper. This court finds such allegations inadequate to meet the burden of establishing fraud committed by the defendants.

Significantly, the entire thrust of plaintiff's complaints is that the compensation he stands to receive is far less in value than the financial return that the defendants have enjoyed as a result of the transaction. Nowhere does plaintiff specifically allege any particular fraudulent concealment or misrepresentation of a material fact by defendants relating to the transfer of MMG's assets. Essentially, what plaintiff bases his complaint upon is that defendants have ended up with greater monetary gain than he has. This is the very situation in which the fair appraisal remedy is to be used: guaranteeing that a dissenting stockholder receives just value for the amount of stock he owns. Plaintiff's concerns that the alleged bonuses and exorbitant salaries received by defendants are actually in

consideration for transferring the assets of MMG will be fully evaluated. If the allegations turn out to be true, Dr. Hooper will receive his fair proportion of the sum of money actually paid for the transfer of MMG's assets.

Accordingly, having considered the pleadings, argument of counsel, and the entire proceedings, it is this 6th day of January, 1994, by the Circuit Court for Montgomery County, Maryland,

ORDERED that defendants' Motion to Dismiss be and the same is hereby granted, and it is further

ORDERED that the above-captioned case be and the same is hereby dismissed.

/s/_____
JAMES L. RYAN
JUDGE, Circuit Court for
Montgomery County, Maryland

IN THE COURT OF APPEALS OF MARYLAND

JAMES L. HOOPER

v.

PERRINO et al.

Petition Docket No. 559

September Term, 1997
(No. 1517, September Term 1996,
Court of Special Appeals)

Entered: March 11, 1998

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answers filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/_____
Robert W. Bell
Chief Judge

DATE: Mar 11 1998

Judge Cathell and Judge Raker did not participate in the consideration of this case.

IN THE COURT OF APPEALS OF MARYLAND

JAMES L. HOOPER

v.

PERRINO et al.

Petition Docket No. 559

September Term, 1997
(No. 1517, Sept. Term, 1996
Court of Special Appeals)

Entered: June 25, 1998

ORDER

The court having considered the motion for reconsideration in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/_____
Robert M. Bell
Chief Judge

DATE: Jun 25 1998

MANDATE
COURT OF SPECIAL APPEALS

No. 1517, September Term 1996

James L. Hooper
v.
Perrino, Dolinsky, Karesh, Withrow,
Juarbe & Baier, M.D., P.A., et al

Entered: December 9, 1997

JUDGEMENT: July 25, 1997: Per Curiam filed
Judgment affirmed
Costs to be paid by appellant.

August 22, 1997: Motion for Reconsideration and Request for Rehearing In Banc filed by counsel for the appellant.

October 28, 1997: Motion for Reconsideration and Request for Rehearing In Banc denied.

December 9, 1997: Mandate issued.

STATMENT OF COSTS:

In Circuit Court: for MONTGOMERY COUNTY
149861

Record	50.00
Stenographer	114.80
* Total *	164.80*

In the Court of Special Appeals:

Filing Record on Appeal	50.00
Printing Brief for Appellant	158.40
Reply Brief	75.60
Portion of Record Extract -- Appellant	1202.40
* Total *	1486.40*
Printing Brief for Appellee	111.60
* Total *	111.60*

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this ninth day of December A.D. 1997

/s/_____
Leslie D. Gradet
Clerk of the Court of Special Appeals

Costs Shown on this Mandate are to be Settled Between Counsel and <u>Not Through This Office</u>.

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

JAMES L. HOOPER,

Appellant,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., *et al.*,

Appellees.

September Term 1996
No. 1517

MOTION FOR RECONSIDERATION AND REQUEST FOR REHEARING *IN BANC*

Appellant, in his ***representative capacity*** as a ***derivative plaintiff*** representing the interests of Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A. (the "Corporation"),[1] respectfully moves for reconsideration of the July 25, 1997 decision of a Panel of this Court.[2]

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[1] The Corporation was named a nominal defendant, as required in a derivative action. 19 Am. Jur.2d, "Corporations", § 2402 at 253; 18 C.J.S. "Corporations", § 412 at 756; Henn and Alexander, Corporations, § 358 at 1035, 1037 (3d Ed. West 1983); Liebman, 3 *Maryland Civil Procedure Forms*, § 318 (1984). The Corporation is a nominal defendant in a derivative action because of its failure to enforce its rights. Henn and Alexander, *supra*, § 369 at 1080.

[2] The Panel was composed of Judges Cathel and Sonner of this Court and District Court Judge Patrick L. Woodward of the Montgomery County District Court, sitting by designation.

The Panel has made a Constitutionally infirm decision, making *in banc* review appropriate. The ruling of the Panel is a denial of Due Process guaranteed by the Constitutions of the United States of America and the State of Maryland. ***The Court has held in violation of Due Process that the property rights of the Corporation (a separate person in law) were determined in a prior action in which the Corporation was not a party, in which its interests were not represented, and which could not have benefited the Corporation.***[3]

I. FACTS

In April, 1993, the majority stockholders of the Corporation[4] voted to sell substantially all of its assets to Avanti of D.C., Inc., and Scott A. Roteman, P.C. ("Purchasers"), for a stated price of $1.5 million. The Corporation has seven stockholders, six of whom are its officers and directors. Together, they own 85% of the stock. The balance of the shares are owned by James L. Hooper, M.D., who founded the Corporation and had hired all the other shareholders. He had his employment and directorship terminated in 1991.

As part of the sales transaction, the six officers/directors were paid $1.8 million in noncompete payments and bonuses, and were given contracts of employment at salaries approximately 30% higher than comparably situated physicians employed by the Purchasers. The true sale price was well over $3 Million of which the Corporation received substantially less than half.

Appellant, in his capacity as an individual stockholder, sued the six other stockholders, alleging that they fraudulently

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[3] "[C]orporations are persons within the meaning of constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of equal protection of the laws." *Covington and Lexington Turnpike Road Company v. Sandford*, 164 U.S. 578, 592 (1896).

[4] The Corporation was then known as Montgomery Medical Group, P.A.

appropriated to themselves assets of the Corporation, to his detriment. He sought compensation for himself as an individual. ***The Corporation was not in any manner a party to that suit***, styled *Hooper v. Withrow, et al.*

Hooper v. Withrow came before Judge Ryan of the Montgomery County Circuit Court. He granted the motion of the six defendants — Susan Withrow, Steven Dolinsky, Charles Karesh, Pasqual Perrino, Herbert Juarbe, and Carolyn Baier — to dismiss on the ground that Dr. Hooper's sole individual remedy was the Appraisal Procedure provided in Md. Code, Corps. & Ass'ns Art. § 3-201, *et seq.* This Court, affirmed. Certiorari was denied by the Court of Appeals.

In April, 1996, this stockholder derivative action was instituted against the six officers/directors alleging, *inter alia*, that they misappropriated to themselves, in violation of fiduciary duties owed to the Corporation, assets of the Corporation through non-compete and employment agreements, and against the Purchasers. ***The suit seeks to recover for the Corporation its assets that were misappropriated by the officers and directors. The suit seeks nothing for Dr. Hooper. It seeks only payment to the Corporation which was not a party in the prior action and which would have received no payment or relief of any kind had the suit before Judge Ryan been successful.***

The Montgomery County Circuit Court (Thompson, J.) dismissed this derivative action as barred by *res judicata* and collateral estoppel. It held that only Dr. Hooper would benefit because all other stockholders of the Corporation are defendants. It overlooked that this suit is in reality a suit by the Corporation against officers and directors for breaches of fiduciary duties owed to the Corporation, ***and that it is irrelevant and immaterial that the officers and directors also are stockholders***.

This Court affirmed, ruling as though Appellant had brought an individual action against the Corporation and the other defendants seeking individual relief. The decision misapprehends that the Corporation is a ***nominal defendant***,

only, and that this action is for the benefit ***of the Corporation that never was a party in any litigation arising from the transaction in question, and would have received no benefit from any prior litigation.***

II. ARGUMENT

A. The Decision Violates Due Process

The Panel states that the prior decision in this case in which Dr. Hooper brought an individual action against other individuals for, *inter alia*, fraud, was an adjudication on the merits that determined the rights of a corporation that was not a party to the first suit, and which could not benefit from the first suit.

Assuming, *arguendo*, that the suit before Judge Ryan were a determination on the merits *vis a vis* Dr. Hooper's individual rights, it could not, consistent with the requirements of Due Process, determine the rights of a non-party corporation.[5]

> The right to a "day in court" is a right protected by the due process clauses of the federal Constitution. *Hansberrry v. Lee*, 311 U.S. 32, 40 . . . (1940). Thus, ***it is a violation of due process for a judgment to be binding on a litigant who was neither a party*** nor a privy to an earlier suit, and therefore without an opportunity to be heard. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 . . . (1971).

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[5] We do not abandon our position that Judge Ryan's decision was not a merits determination, except to the extent, and only to the extent, that it determined that Dr. Hooper's remedy for individual relief was limited to the Appraisal Procedure.

Alderman v. Chrysler Corporation, 480 F. Supp. 600, 607 (E.D. Va. 1979) (emphasis added).[6]

The Panel incorrectly held that this case is controlled by *Williams v. Messick*, 177 Md. 605,11 A. 2d 472 (1940). Apart from the fact that Due Process does not appear to have been raised in *Messick*, it involved an individual action seeking appointment of a receiver for a corporation. The case was decided on the merits, based on an evidentiary hearing, and the appointment was denied. Thereafter, the losing shareholder brought a derivative action seeking the same relief. The Court of Appeals held the derivative action barred. Thus, in *Messick* both actions sought relief for the corporation. Here, relief was sought for Dr. Hooper, individually, ***not for the Corporation.***

This derivative action seeks relief only for the Corporation, not for Dr. Hooper individually. ***Unlike Messick, the first, individual action would have provided no relief for the non-party corporation.*** The difference is determinative of the effect of the first action. ***That is so whether or not Judge Ryan's decision were a merits determination*** as to the right to individual relief, or as to the breach of any duty owed to Dr. Hooper ***as an individual. In Messick, the corporation's interests were represented in the first suit.*** The second suit would have represented the corporation's interests in exactly the same manner. ***Here, the Corporation's interests were not represented in the first suit. Only the instant case represents the Corporation's interests.***

Nor were Dr. Hooper and the Corporation in privity. Dr. Hooper was not in control of the Corporation (*Cf. Bodner v. Brinsfield*, 60 Md. App. 524, 483 A.2d 1290 (1984)), and, as stated above, the first action, even if successful, would have been of no benefit to the Corporation.

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[6] Due Process was raised in our Main Brief in this case at 20 n.24.

B. The Panel's Interpretation of Judge Ryan's Decision Would Make that Decision Void

Had the claim made in the suit before Judge Ryan been for violations of duties owed to the Corporation, it should have been dismissed because it was not brought as a derivative action. Dr. Hooper had no individual right of action. The only right of action was in the Corporation. Where "the stockholder [bringing an action] has no [individual] right of action," the suit must be dismissed for lack of proper parties. *Waller v. Waller*, 187 Md. 185, 194, 49 A.2d 449, 454 (1946); *O'Donnel v. Sardegna*, 336 Md. 18, 28, 646 A.2d 398, 403 (1994).

A corporation is an ***indispensable*** party in an action brought by a stockholder for the benefit of a corporation. "The presence of necessary parties `cannot be waived by other parties to the proceedings.'" *Bodnar v. Brinsfield, supra*, 60 Md. App. at 531, 483 A.2d at 1294. It is "like subject matter jurisdiction" (*Id.*). Thus, "the general rule is that a judgment rendered because of a defect in parties does not operate to bar a subsequent action" (46 Am. Jur. 2d, "Judgments", § 636 at 903), because ***such prior judgment is void***.

A void judgment is not a valid judgment. It is subject to attack at any time by anyone. It cannot support a claim of *res judicata* or collateral estoppel because either *res judicata* or collateral estoppel requires absolutely that there have been a ***valid*** final judgment on the merits. *Cassidy v. Board of Education*, 316 Md. 50, 57, 557 A.2d 227, 230 (1989) (*res judicata*); *Major v. First Virginia Bank*, 97 Md. App. 520, 533-534, 631 A.2d 959, 971 (1993) (*res judicata*); *Caldor v. Bowden, 330 Md. 632, 657, 625, A. 2d 959, 971 (1993) (collateral estoppel); Pope v. Board of School Commissioners of Baltimore City*, 106 Md. App. 578, 594, 665 A. 2d 713, 721 (1995) (collateral estoppel).

C. The Panel Has Misconceived the Nature of a Derivative Action

This action was brought for the benefit of the Corporation, ***not*** against the Corporation. The Panel inaccurately states that this action was "brought to redress alleged fraud ***on the part of a corporation*** by its officers and directors" (Slip Op. at 1, emphasis added). It also states that Dr. Hooper "sued appellees Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A." (*Id.*), totally overlooking that the Corporation is not in reality a defendant, but is only nominally a defendant, and that the derivative action is brought for the benefit of the Corporation.

The Panel has erroneously treated this case as being brought for Dr. Hooper's benefit, and as though he were seeking a recovery from the Corporation. Thus, the Panel states (Slip Op. at 3) that "Hooper is the only person to benefit from this suit because he is suing all the other stockholders." That is flatly wrong. The only person that would benefit from this suit is the Corporation, because, as the Panel correctly states, "where directors commit a breach of trust, they are liable [only] to the corporation" (*Id.*), citing *Waller v. Waller*, *supra.*

Hooper is not suing the other stockholders. This suit was brought on behalf of the Corporation to recover from officers and directors who breached fiduciary duties they owed to the Corporation. ***The fact that the defendant officers and directors also are stockholders is immaterial.*** Their liability to the Corporation derives from, and is the same, whether or not they also are stockholders.

D. The Panel Erroneously Has Held that the Appraisal Procedure Limits a Corporation's Rights

In discussing Judge Ryan's ruling in the prior case brought by Hooper individually, the Panel states not only that Judge Ryan found that no fraud had been committed against

Hooper individually (which is irrelevant since this action seeks redress for the Corporation, not for Hooper), but that "Hooper was not entitled to an alternative to the appraisal remedy based on the merits" (Slip Op. at 4-5). All that Judge Ryan ***validly*** could and did rule in that case was that Hooper was not entitled to any ***individual*** remedy other than that provided by the Appraisal Procedure.

Given the Panel's analysis of Judge Ryan's ruling, that judgment stands for the proposition that officers and directors who own a controlling interest in a corporation may breach fiduciary duties they owe as officers and directors and that such corporation has no remedy. Effectively, the holding is that the Appraisal Procedure cuts off all rights of the corporation. We know of no case that holds that to be the law. Thus, the Unreported Opinion creates a new rule of law inconsistent with the most basic principles of corporation law.[7]

The Appraisal Remedy deals with compensation of an individual stockholder for his shares, only. ***It does not affect the rights of a corporation to sue for wrongs done to it.*** Even though the officers and directors hold a controlling interest, they cannot legally use that control to ratify fraud against, or breaches of fiduciary duties owed to, the Corporation. *Parish v. Maryland & Virginia Milk Producers Ass'n*, 250 Md. 24, 85, 242 A. 2d 512, 546 (1968), *appeal after remand*, 261 Md. 618, 277 A. 2d 19 (1971), *certiorari denied*, 404 U.S. 940 (1971).

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[7] The Unreported Opinion fails to deal with legitimate and valid arguments advanced on the assumption that Judge Ryan made a merits determination, raising the question whether there has been meaningful appellate review. While Due Process and Equal Protection do not mandate a right of appeal, if the right is given, it must be meaningful. Additionally, the composition of the Panel is, at the least, questionable. Whatever may be the validity of designating a District Judge to sit on a Panel of this Court, it seems, at a minimum, inappropriate to allow a District Judge to sit to review a decision of a Circuit Judge from the same county as that in which the District Judge sits. *See* n.2, *supra*.

E. The Panel Interpreted the Transactional Analysis of *Res Judicata* so as to Violate Due Process

The Panel has misapplied Maryland's transactional test for application of *res judicata*. Thus, in precluding any action for the Corporation, the Panel states that "the claims [made in this case] were either already argued ***or arose from the same transaction***" as was involved in the prior case (Slip Op. at 4, emphasis added). "Causes of action which are distinct and independent, although growing out of the same . . . transaction . . . may be sued on separately" 13 M.L.E., "Judgments", §188 at 329-330; 50 C.J.S., "Judgments", § 674 at 120-121.

Even if the transactional test barred an action by Hooper seeking relief ***for himself***, it ***cannot Constitutionally bar an action for the benefit of a different party*** — the Corporation. What the Panel effectively has held is that if two people (A and B) are crossing the street at the same time, and a single car hits both of them, and A sues the driver and loses, B is precluded from suing the driver. That, of course, is not so because B has not had his day in court. Even where A must sue in a representative capacity for B, *res judicata* does not bar the action for B's benefit. Due Process requires that B have his day in court. So here, the Corporation has not had its day in court and is being denied Due Process. *See* our Main Brief at 20 n.24.

Respectfully submitted,

/s/_____

W. Ray Ford
14300 Gallant Fox Lane
Suite 103
Bowie, Maryland 20715
(301) 805-1101

IN THE COURT OF APPEALS OF MARYLAND

JAMES L. HOOPER,

Petitioner,

v.

PERRINO, DOLINSKY, KARESH,WITHROW, JUARBE & BAIER, M.D., P.A.;
SUSAN WITHROW, M.D.;
PASQUAL PERRINO, M.D.;
CHARLES KARESH, M.D.;
HERBERT JUARBE, M.D.;
CAROLYN BAIER, M.D.;
STEVEN DOLINSKY, M.D.;
AVANTI OF THE DISTRICT, INC.;
SANUS CORP. HEALTH SYSTEMS; and
SCOTT ROTEMAN, t/a.,
SCOTT ROTEMAN, M.D., P.C.,

Respondents.

September Term, 1997
No. 559

PETITION FOR A WRIT OF CERTIORARI

James L. Hooper, in his ***representative capacity*** as a ***derivative plaintiff*** representing the interests of Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A. (the "Corporation"),[1] respectfully petitions for a writ of certiorari to

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[1] The Corporation was named a nominal defendant, as required in a derivative action. 19 Am. Jur.2d, "Corporations", § 2402 at 253; 18 C.J.S. "Corporations", § 412 at 756; Henn and Alexander, *Corporations*, § 358 at 1035, 1037 (3d Ed. West 1983); Liebman, 3 *Maryland Civil Procedure Forms*, § 318 (1984). The Corporation is a nominal defendant in a

review the July 25, 1997 decision of the Court of Special Appeals in *Hooper* v. *Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A., et al.*, Court of Special Appeals No. 1517, September Term, 1996.

The Court of Special Appeals has made a Constitutionally infirm decision. It has denied Due Process guaranteed by the Constitutions of the United States of America and the State of Maryland, ***holding in violation of Due Process that the property rights of the Corporation (a separate person in law) were determined in a prior action in which the Corporation was not a party, in which its interests were not represented, and which could not have benefited the Corporation.***[2] ***Additionally, the Court of Special Appeals held that dismissal of a case for choosing an unavailable remedy is a judgment on the merits, and it announced new or changed rules of law in an Unreported Opinion (per curiam).*** **The use of an Unreported Opinion to create and apply new rules of law applicable to this case, and this case, only, violates Due Process and/or Equal Protection.**

PRIOR PROCEEDINGS

This stockholder derivative action, styled *Hooper v. Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A., et al.*, Civil Action No. 149861, was filed in the Circuit Court for Montgomery County, Maryland. Judgment of the Circuit Court, which adjudicated all claims in their entirety, was entered July 30, 1996.

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derivative action because of its failure to enforce its rights. Henn and Alexander, *supra*, § 369 at 1080.

[2] "[C]orporations are persons within the meaning of constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of equal protection of the laws." *Covington and Lexington Turnpike Road Company v. Sandford*, 164 U.S. 578, 592 (1896) (U.S. Const.); *Brooks v. State Board of Funeral Directors and Embalmers*, 233 Md. 98,108, 195 A.2d 728, 733 (1963) (Md. Decl. of Rights).

The case was decided by the Court of Special Appeals on July 25, 1997, as case No. 1517, September Term, 1996. Its mandate issued December 9, 1997, following the October 26, [*sic*]1997 denial of a timely motion for reconsideration and a request for rehearing *in banc*.[3]

REFERENCE TO CONSTITUTIONAL AND STATUTORY PROVISIONS

The following Constitutional and Statutory Provisions are involved: Amendments V and XIV of the Constitution of the United States of America; Article 24 of the Maryland Declaration of Rights; Maryland Code, Corporations and Associations Article, Section 3-201, *et seq*. (Appraisal Statute).

QUESTIONS PRESENTED

1. Whether the Court of Special Appeals in deciding that *res judicata* and/or collateral estoppel bars an action for a corporation which was not a party in the prior case violated Due Process and/or Equal Protection.

2. Whether a judgment that a plaintiff chose an inappropriate remedy is a decision on the merits.

I. FACTS

In April, 1993, the majority stockholders of the Corporation[4] voted to sell substantially all its assets to Avanti

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[3] The required attachments appear under tabs 1 through 4. We also have attached the Circuit Court and Court of Special Appeals decisions in *Hooper v. Withrow* (Mont. County Cir. Ct. Civ. Action No. 111401) and the Court of Special Appeals decision in that case (Sept. Term, 1994, No. 169) under Tabs 5 and 6, respectively, because the courts below concluded that *Withrow* is an estoppel by judgment precluding this derivative action.

[4] The Corporation was then known as Montgomery Medical Group, P.A.

of D.C., Inc., and Scott A. Roteman, P.C. ("Purchasers"), for a stated price of $1.5 million. The Corporation has seven stockholders, six of whom are its officers and directors, and were at all relevant times corporate employees. Together, they own 85% of the stock. The balance of the shares are owned by Petitioner, who founded the Corporation and had hired all the other shareholders. He had his employment and directorship terminated in 1991.

As part of the sales transaction, the six officers/directors were paid $1.8 million in noncompete payments and bonuses, and were given contracts of employment at salaries approximately 30% higher than comparably situated physicians employed by the Purchasers. The true sale price (and fair market value) of the Corporation's assets was well over $3 Million of which the Corporation received substantially less than half.

Petitioner, in his capacity as an individual stockholder, sued the six other stockholders, alleging that they fraudulently appropriated to themselves assets of the Corporation, to his detriment. He sought compensation for himself as an individual. ***The Corporation was not in any manner a party to that suit***, styled *Hooper v. Withrow, et al.*

Hooper v. Withrow came before Judge Ryan of the Montgomery County Circuit Court. He granted the motion of the six defendants -- Susan Withrow, Steven Dolinsky, Charles Karesh, Pasqual Perrino, Herbert Juarbe, and Carolyn Baier -- to dismiss on the ground that Petitioner's sole individual remedy was the Appraisal Procedure provided in Md. Code, Corps. & Ass'ns Art. § 3-201, *et seq*. The Court of Special Appeals affirmed. Certiorari was denied by this Court.

In April, 1996, this stockholder derivative action was instituted against the officers/directors of the Corporation alleging, *inter alia*, that they misappropriated to themselves, in violation of fiduciary duties owed to the Corporation, assets of the Corporation through non-compete and employment agreements, The Purchasers also were named defendants. ***The suit seeks to recover for the Corporation its assets that were***

misappropriated by the officers and directors, in collusion with the Purchasers. The suit seeks nothing for Petitioner. It seeks only payment to the Corporation which was not a party in the prior action and which would have received no payment or relief of any kind had Petitioner's suit before Judge Ryan been successful.

The Montgomery County Circuit Court (Thompson, J.) dismissed this derivative action as barred by *res judicata* and collateral estoppel. It held that only Petitioner would benefit because all other stockholders of the Corporation are defendants. It overlooked that this suit is in reality a suit by the Corporation against officers and directors for breaches of fiduciary duties owed to the Corporation,[5] ***and that it is irrelevant and immaterial that the officers and directors also are stockholders***.

The Court of Special Appeals affirmed, ruling as though Petitioner had brought an individual action against the Corporation and the officer/director defendants seeking individual relief. The decision misapprehends that the Corporation is a ***nominal defendant***, only, that this action is for the benefit ***of the Corporation that never was a party in any litigation for compensation arising from the transaction in question, and that the Corporation would have received no benefit from any prior litigation.***

II. ARGUMENT

A. Introduction

The Court of Special Appeals has created a rule of law that is violative of the Due Process provisions of the United States and Maryland Constitutions. It has held that a person (in this case the Corporation)[6] which was not a party in a prior action, was not in privity with the party in the prior action, and

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[5] As stated, *supra*, the suit also names the Purchasers for their collusion with the officers/directors to misappropriate corporate assets.

[6] *See* n.2, *supra*.

which would have received no benefit from the prior action is estopped by the prior judgment action [*sic*] from seeking relief.

That rule has broad impact and contravenes not only Constitutional guarantees, but is contrary to any accepted application of doctrines of estoppel by judgment. It takes the transactional test for application of *res judicata* and collateral estoppel and expands it beyond either reasonable or Constitutional limits. The Court of Special Appeals in effect held that if causes of action for two persons arise from the same transaction, an unsuccessful suit by one such person, not in privity, bars a suit by the second person because both causes of action arose from the same transaction.

The holding of the Court of Special Appeals is premised on a misconception of the nature of a stockholder derivative action. Apparently, the Court of Special Appeals believes that because a corporation on whose behalf a derivative action is brought is named a ***nominal*** defendant, the suit is against such corporation. That in and of itself is such a fundamental misunderstanding of the law that in our corporate world an issue of public importance is presented.

Furthermore, the Court of Special Appeals has misconstrued and misapplied the decision of this Court in *Williams v. Messick*, 177 Md. 605, 11 A.2d 472 (1940). Thus, the Court of Special Appeals ruled that where an ***individual*** action against other stockholders for the sale of corporate assets was dismissed based on a finding that the Appraisal Remedy in Md. Code Corps. & Ass'ns Art. § 3-201, *et seq.*, is the exclusive ***individual*** remedy, such dismissal is an adjudication on the merits. In other words, the Court of Special Appeals ruled that a dismissal for having chosen an inappropriate remedy is a merits adjudication on the substance and validity all allegations in the complaint — allegations never tried, and, indeed, never subject to discovery.

Moreover, the Court of Special Appeals has held that the Appraisal Remedy in Md. Code, Corps & Ass'ns Art § 3-201, *et seq.*, which is a remedy for a dissenting stockholder in a

terminal corporate transaction is to receive "fair value" for his shares of stock, precludes an action for or by the corporation against officers and directors who committed fraud against, and/or breached fiduciary duties they owe to, the corporation by virtue of such positions. That holding is at odds with the purpose and nature of the Appraisal Remedy — solely a remedy for a stockholder as an individual.

Thus, this case presents issues of great public importance, and of a Constitutional nature, involving basic policies affecting the scope and effect of judgments, and issues that impact broadly defining the nature of a corporation, and the distinctions between a corporation, its officers and directors, and its stockholders.

Finally, the Court of Special Appeals has made important new law, or changed important existing law, in an Unreported Opinion. Using a *per curiam* Unreported Opinion in such circumstances is both inappropriate and contrary to the purposes for which such procedure was intended. We believe that making important new or changed law which has no precedential value — law for this case and this case, only — is a denial of both Due Process and Equal Protection. To permit such practice is to invite arbitrary and capricious decisions without the uniform and evenhanded application of legal principles our system of justice and Constitutions — Federal and Maryland — contemplate and mandate. While an initial error as to the nature of a case may not violate Constitutional guarantees, once that misevaluation has, as here, been called to the attention of the Court of Special Appeals, its failure to deal with the issue rises, we believe, to a Constitutional level and presents important Public Policy questions.

B. The Decision Below Violates Due Process and/or Equal Protection

The Court of Special Appeals states that the prior decision in which Petitioner brought an individual action against other individuals for, *inter alia*, fraud, was an

adjudication on the merits that determined the rights of a corporation that was not a party to the first suit, and which could not benefit from the first suit.[7]

Assuming, *arguendo*, that the suit before Judge Ryan were a determination on the merits *vis a vis* Petitioner's individual rights, it could not, consistent with the requirements of Due Process, determine the rights of a non-party corporation, not in privity.[8]

> The right to a "day in court" is a right protected by the due process clauses of the federal Constitution. *Hansberrry v. Lee*, 311 U.S. 32, 40 . . . (1940). Thus, ***it is a violation of due process for a judgment to be binding on a litigant who was neither a party*** nor a privy to an earlier suit, and therefore without an opportunity to be heard. *Blonder-Tongue*

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[7] *Res judicata* bars a subsequent action, if, ***and only if, all*** of the following elements are present: (1) a valid final judgment on the merits; and (2) the two actions are between the same parties or their privies; ***and*** (3) the claims presented in the two actions are identical. *Cassidy v. Board of Education*, 316 Md. 50, 57, 557 A.2d 227, 230 (1989); *Major v. First Virginia Bank*, 97 Md. App. 520, 533-534, 631 A.2d 127, 133 (1993). The same principles apply to collateral estoppel. However, collateral estoppel is less preclusive and applies only to issues actually litigated. It requires a valid final judgment on the merits, an identity of parties ***against*** whom the estoppel is asserted, and an identity of claims. Collateral estoppel may be asserted by a stranger to the prior action. *Caldor v. Bowden*, 330 Md. V 632, 657, 625 A.2d 959, 971 (1993); *Pope v. Board of School Comm'rs of Baltimore City*, 106 Md. App. 578, 594, 665 A.2d 713, 721 (1995).

[8] We contend that Judge Ryan's decision in fact was not a merits determination, except to the extent, and only to the extent, that it determined that Dr. Hooper's remedy for individual relief was limited to the Appraisal Procedure. *See*, Point G, *infra*.

Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 . . . (1971).

Alderman v. Chrysler Corporation, 480 F.Supp. 600, 607 (E.D. Va. 1979) (emphasis added).[9] *Accord: Richards v. Jefferson County, Ala.*, _U.S._, 116 S.Ct. 1761, 1765 and n.4 (1996), citing and quoting from *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918).

The Court of Special Appeals incorrectly held that this case is controlled by *Williams v. Messick, supra*. Apart from the fact that Due Process does not appear to have been raised in *Messick*, that case involved an individual action seeking appointment of a receiver for a corporation. The case was decided on the merits, based on an evidentiary hearing, and the appointment was denied. Thereafter, the losing shareholder brought a derivative action seeking the same relief. This Court held the derivative action barred. Thus, ***in Messick both actions sought relief for the corporation.*** Here, relief was sought in the first action only for Petitioner, individually, ***not for the Corporation***. *See also* Point G, *infra*.

This derivative action seeks relief only for the Corporation, not for Petitioner individually. ***Unlike Messick, the first, individual action would have provided no relief for the non-party corporation.*** The difference is determinative of the effect of the first action. ***That is so whether or not Judge Ryan's decision were a merits determination*** as to the right to individual relief, or as to the breach of any duty owed to Dr. Hooper ***as an individual. In Messick, the corporation's interests were represented in the first suit.*** The second suit would have represented the corporation's interests in exactly

[9] Due Process was raised in our Main Brief in the Court of Special Appeals at 20 n.24.

the same manner. ***Here, the Corporation's interests were not represented in the first suit. Only the instant case asserts the Corporation's interests.***

Nor were Petitioner and the Corporation in privity. Petitioner was not in control of the Corporation (*Cf. Bodner v. Brinsfield*, 60 Md. App. 524, 483 A.2d 1290 (1984)), and, as stated above, the first action, even if successful, would have been of no benefit to the Corporation.

C. The Court of Special Appeals' Interpretation of Judge Ryan's Decision Would Make that Decision Void

Had the claim made in the suit before Judge Ryan been for violations of duties owed to the Corporation, it should have been dismissed because it was not brought as a derivative action. Petitioner in such case would have had no individual right of action. Only the Corporation would have had a right of action. Where "the stockholder [bringing an action] has no [individual] right of action," the suit must be dismissed for lack of proper parties. *Waller v. Waller*, 187 Md. 185, 194, 49 A.2d 449, 454 (1946); *O'Donnell v. Sardegna*, 336 Md. 18, 28, 646 A.2d 398, 403 (1994).

A corporation is an ***indispensable*** party in an action brought by a stockholder for the benefit of a corporation. "The presence of necessary parties `cannot be waived by other parties to the proceedings.'" *Bodnar v. Brinsfield*, *supra*, 60 Md. App. at 531, 483 A.2d at 1294. It is "like subject matter jurisdiction" (*Id.*). Thus, "the general rule is that a judgment rendered because of a defect in parties does not operate to bar a subsequent action" (46 Am. Jur. 2d, "Judgments", § 636 at 903), because ***such prior judgment is void***.

A void judgment is not a valid judgment. It is subject to attack at any time by anyone. It cannot support a claim of *res judicata* or collateral estoppel because both *res judicata* and collateral estoppel require absolutely that there has been a ***valid*** final judgment on the merits. *Cassidy v. Board of*

Education, *supra*, 316 Md. at 57, 557 A.2d at 230 (*res judicata*); *Major v. First Virginia Bank*, *supra*, 97 Md. App. at 533-534, 631 A.2d at 971 (*res judicata*); *Caldor v. Bowden*, 330 Md. at 657, 625, A.2d at 971 (collateral estoppel); *Pope v. Board of School Comm'rs of Baltimore City*, *supra*, 106 Md. App. at 594, 665 A.2d at 721 (collateral estoppel).

D. The Court of Special Appeals Misconceived the Nature of a Derivative Action

This action was brought for the benefit of the Corporation, ***not*** against the Corporation. The Court of Special Appeals inaccurately states that this action was "brought to redress alleged fraud ***on the part of a corporation*** by its officers and directors" (Slip Op. at 1, emphasis added). It also states that Petitioner "sued appellees Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A." (*Id.*), totally overlooking that ***the Corporation is not in reality a defendant, but is only nominally a defendant, and that the derivative action is brought for the benefit of the Corporation***. *See* n.1, *supra*.

The Court of Special Appeals erroneously treated this case as brought for Petitioner's individual benefit, and as though he were seeking a recovery from the Corporation. Thus, the Court of Special Appeals states (Slip Op. at 3) that Petitioner "is the only person to benefit from this suit because he is suing all the other stockholders." That is flatly wrong. The only person that would benefit from this suit is the Corporation, because, as the Court of Special Appeals correctly states, "where directors commit a breach of trust, they are liable [only] to the corporation" (*Id.*), citing *Waller v. Waller*, *supra*.

Petitioner is not suing the other stockholders. Petitioner is not, in effect, suing anyone.

This suit was brought on behalf of the Corporation to recover from officers and directors who breached fiduciary duties they owed to the Corporation. ***The fact that the***

defendant officers and directors also are stockholders is immaterial. Their liability to the Corporation derives from, and is the same, whether or not they also are stockholders. "[I]f allocation of funds as consideration for a noncompete agreement results in a corporation receiving less than fair market value for the sale of its assets, then the officer or director is unlawfully diverting funds ***belonging to the corporation.***" *Wagner v. Foote*, 908 P.2d 884, 886 (Wash. 1996) (emphasis added), citing *Pupecki v. James Madison Corporation*, 328 N.E.2d 1030, 1033 (Mass. 1978).

E. The Court of Special Appeals Erroneously Held that the Appraisal Procedure for Individual Stockholders Limits a Corporation's Rights

In discussing Judge Ryan's ruling in the prior case brought by Hooper individually, the Court of Special Appeals states not only that Judge Ryan found that no fraud had been committed against Hooper individually (which is irrelevant since this action seeks redress for the Corporation, not for Hooper), but that "Hooper was not entitled to an alternative to the appraisal remedy based on the merits" (Slip Op. at 4-5). All that Judge Ryan ***validly*** could and did rule in that case was that Hooper was not entitled to any ***individual*** remedy other than that provided by the Appraisal Statute. *See* Point C, *supra*.

Given the Court of Special Appeals' analysis of Judge Ryan's ruling, that judgment stands for the proposition that officers and directors who own a controlling interest in a corporation may breach fiduciary duties they owe as officers and directors and that such corporation has no remedy. Effectively, the holding is that the Appraisal Statute cuts off all rights of the corporation. We know of no case that holds that to be the law. Thus, the Unreported Opinion creates a new rule

of law inconsistent with the most basic principles of corporation law.[10]

The Appraisal Statute deals with compensation of an individual stockholder for his shares, only. ***It does not affect the rights of a corporation to sue for wrongs done to it.*** Even though the officers and directors hold a controlling interest, they could not legally use that control to ratify their fraud against, or breaches of fiduciary duties owed to the Corporation. *Parish v. Maryland & Virginia Milk Producers Ass'n*, 250 Md. 24, 85, 242 A.2d 512, 546 (1968), *appeal after remand* 261 Md. 618, 277 A.2d 19 (1971), *certiorari denied* 404 U.S. 940 (1971).

F. The Court of Special Appeals Interpreted the Transactional Analysis of *Res Judicata* so as to Violate Due Process

The Court of Special Appeals has misapplied Maryland's transactional test for application of *res judicata*. Thus, in precluding any action for the Corporation, the Court of Special Appeals states that "the claims [made in this case] were either already argued ***or arose from the same transaction***" as was involved in the prior case (Slip Op. at 4, emphasis added). "Causes of action which are distinct and independent, although growing out of the same . . . transaction

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[10] The Unreported Opinion fails to deal with legitimate and valid arguments advanced on the assumption that Judge Ryan made a merits determination, raising the question whether there has been meaningful appellate review. While Due Process and Equal Protection do not mandate a right of appeal, if the right is given, it must be meaningful. *See* Point H, *infra*. Additionally, the composition of the Panel is, at the least, questionable. Whatever may be the validity of designating a District Judge to sit on a Panel of this Court, it seems, at a minimum, inappropriate to allow a District Judge (Judge Patrick L. Woodward) to sit to review a decision of a Circuit Judge from the same county as that in which the District Judge sits.

. . . may be sued on separately." 13 M.L.E., "Judgments", § 188 at 329-330; 50 C.J.S., "Judgments", § 674 at 120-121.

Even if the transactional test barred an action by Hooper seeking relief ***for himself, it cannot Constitutionally bar an action for the benefit of a different party*** — the Corporation. *See Richards*, *supra*, 116 S.Ct. at 1765 ("We have long held . . . that extreme applications of res judicata may be inconsistent with federal rights `fundamental in character.'") What the Court of Special Appeals effectively has held is that if two people (A and B) who are crossing the street at the same time are struck by a single car, and A sues the driver and loses, B is precluded from suing the driver. That, of course, is not so because B has not had his day in court. Even where A must sue in a representative capacity for B, *res judicata* does not bar the representative action for B's benefit. Due Process requires that B have his day in court. So here, the Corporation has not had its day in court and is being denied Due Process.

G. There Never Has Been a Judgment on the Merits

As stated, *supra*, the Court of Special Appeals held that *Hooper v. Withrow* (the prior case before Judge Ryan) was a judgment on the merits. It then used that conclusion to reach an incorrect and Constitutionally infirm result. However, its holding that there had been a merits determination is error and is contrary to this Court's decision in *Williams v. Messick*, *supra*, on which it relied.

A judgment on the merits is traditionally defined as one which rules on a substantive ground of the action rather than on matters of practice, procedure, jurisdiction, or form. *Major v. First Virginia Bank*, *supra*, 97 Md. App. at 525, 631 A.2d at 134.

The only thing decided in the prior case before Judge Ryan was that Dr. Hooper improvidently brought an action seeking payment for his shares in the Corporation — that he used an unavailable remedy for that individual relief.

In this case, the courts below confused a procedural dismissal in the prior case with a decision on the merits. Defendants in the prior case before Judge Ryan sought a procedural dismissal, claiming that the only individual remedy Dr. Hooper had for fair value payment for his stock was the Fair Appraisal Procedure. Neither they, the Circuit Court, nor the Court of Special Appeals addressed the merits. Both courts discussed only "just value for the stock Dr. Hooper owns." (emphasis added), and held that ***"[i]f as Hooper claims contracts by [the Purchasers] with [the named individual defendants] `represent a substantial portion of the value of the assets . . .,' a portion of that value will be assigned to Hooper's shares by the appraiser"*** (emphasis added) (Slip Op. at 9, Ct. Spec. App.); (Slip Op. at 5, Cir. Ct.).

The decision in the prior case of the Motion to Dismiss on the procedural question of appraisal rights as the exclusive ***individual*** remedy for payment for Dr. Hooper's stock did not, and could not, address the merits even of the claims of fraud, breach of fiduciary duty, and conversion Hooper ***made in his individual capacity***, seeking individual relief. The Circuit Court in the instant case was confused and in error when it concluded that "[t]he counts relating to fraudulent breach of fiduciary duty, and conversion, general fraud and constructive fraud . . . have been considered [in the prior individual action] and are not the type that form the basis for an exception to the application of the appraisal rights rule', [and that] plaintiff is only entitled to litigate fraud if it rises to a level sufficient to qualify as an exception [to the Fair Appraisal Remedy] which would then permit litigation" (Slip Op. at 7).

The appraisal remedy applies only to the rights of an individual to dispose of his or her stock. A corporation has no appraisal remedy. Accordingly, Judge Ryan's holding in the prior case that Dr. Hooper's sole individual remedy was the Appraisal Statute had no impact on the rights of the

Corporation. Moreover, there is no "level of fraud" requirement for the Corporation to enforce its rights.[11]

In *Messick, supra*, this Court clearly stated that a dismissal based on the impropriety of granting relief irrespective of the plaintiff's rights on the merits of the case does not bar a subsequent action, even on the same claim:

> Of course, an application for a receivership might be denied on either of two grounds; [1] either because it was considered improper to grant it whatever the complainants rights on the merits . . ., or [2] because the rights were not established. ***And only an adjudication on the second ground would give rise to an estoppel by the decree against asserting those rights again in another action.***

177 Md. at 611, 11 A.2d at 475 (bracketed numbers and emphasis added). *See also Surrey Inn v. Jennings*, 215 Md. 446, 452-453, 138 A.2d 658, 662 (1958) ("Thus neither of the decisions on demurrer in the equity suit went so far as to determine the question of Surrey Inn's liability to Jennings for money lent, and the equity suit does not constitute a bar to Jennings' present suit to enforce that liability."); *Moodhe v. Schenker*, 176 Md. 259, 267, 4 A.2d 453, 457 (1939) ("`[J]udgment on demurrer based on formal or technical defects, question of pleading, or want of jurisdiction not bar to subsequent action'"); *Cassidy v. Board of Education, supra*, 316 Md. at 63, 557 A.2d at 233 ("As a general rule, dismissal for failure to satisfy a precondition `is not an adjudication on the merits . . .'").

"A judgment . . . will operate as a bar . . . on the same cause of action if, and only if, the judgment and the

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[11] Neither Judge Ryan nor the Court of Special Appeals in the prior case spoke of a "level of fraud." The decisions hold only that the alleged fraud was the type that could be evaluated in an Appraisal Proceeding to determine the value of Dr. Hooper's stock.

proceedings leading up thereto involved, or afforded full legal opportunity for, an investigation and determination of the merits of the suit." 50 C.J.S., "Judgments", § 627 at 53.

> A judgment is not on the merits if the case went off on any preliminary, subsidiary, or technical plea or objection. * * * [A] judgment denying recovery to plaintiff because of want of capacity to sue is not a bar to another action.

Id. § 626 at 51.

The question of appraisal as an exclusive ***individual*** remedy for a stockholder as to his individual stock was a ***procedural defense raised to avoid consideration of the merits***. Furthermore, the value of individual stock and the misappropriation of corporate assets are different issues and require different remedies. The former can be asserted individually by a stockholder; the latter can be asserted only by the corporation itself, or, derivatively, by a stockholder. *See Waller v. Waller, supra*, 187 Md. at 194, 49 A.2d at 454; *O'Donnell v. Serdegna, supra*, 336 Md. at 28, 646 A.2d at 403.

The prior litigation is exactly the situation posited in *Messick*. The relief in the prior action was denied "because it was considered improper to grant it [the relief] whatever the complainant's rights on the merits' thus ***not*** giving "rise to an estoppel by decree." 177 Md. at 611, 11 A.2d at 475.

H. The Court of Special Appeals' Use of an Unreported Opinion To Create New or Changed Law Violates Due Process and/or Equal Protection

Due process mandates a fair hearing in which the contentions of the parties are considered. In this case, the Court of Special Appeals failed to address Petitioner's contention that even if *Hooper v. Withrow* constituted a judgment on the merits, this action on behalf of the

Corporation is not barred. It simply determined that the prior case was a judgment on the merits and ignored Petitioner's other contentions -- contentions, which for reasons stated above, clearly were not only not frivolous, but based on the application of existing law. Especially when the oversights were called to the Court of Special Appeals' attention in a motion for reconsideration and not addressed, the Court of Special Appeals went beyond simple error and violated Petitioner's Due Process rights to a meaningful appeal.

The Court of Special Appeals also violated Equal Protection by using a *per curiam* Unreported Opinion (Md. Rule 8-114) to create new and changed law applicable to this case, and this case, only. The Unreported Opinion was not intended to be used as a vehicle for arbitrary and capricious decisions, or to create new or changed rules of law for a single case. Rather, the purpose is to avoid publication of opinions that do ***not*** have precedential value because they apply well-established, settled rules of law. It was not intended that precedent-setting decisions be subject to the light of day only for some litigants, selected in an arbitrary and capricious manner.

Equal protection requires that comparably situated persons be treated the same. *National Union v. Arnold*, 348 U.S. 37, 41 (1955). "[I]f a full and fair trial on the merits is provided,[12] the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate

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[12] There is a serious question whether the hearing in the Circuit Court satisfied Due Process. Judge Thompson, who heard the case, had selected Albert D. Brault (*see* n. 10, *supra*) to serve as his "*alter ego*" under a program initiated by the Montgomery County Bar Association. Thus, Mr. Brault enjoyed both a special relationship with, and favored access to, Judge Thompson. The special relationship was not revealed to petitioner's counsel. Only after judgment did they learn of the special relationship. On motion by Petitioner's counsel, Judge Thompson recused himself from hearing Respondents' motion for sanctions against Petitioner.

review. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). However, "[w]hen an appeal afforded, . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause" (*Id.*, and cases therein cited). As stated above, the Court of Special Appeals has created new and changed law without binding precedent — a situation applied to Petitioner, but not to others. Thus, it has treated Petitioner differently.

Not only is the failure to publish a decision a departure from precedent and, at the least, an invitation to arbitrary and capricious decisions. Such action by the Court of Special Appeals may limit the ability of a litigant to obtain review in this Court. Since this Court reviews cases for importance of the issue and the Public Interest, an Unreported Opinion that has no precedential value may be viewed with less concern than a Reported Opinion which provides guidance for both litigants and the lower courts. In other words, this Court might decide to leave an Unreported Opinion stand, while, had the same departure from precedent been published, it would hear the case to address that deviation. That potential, or even perceived possibility, is a further reason for this Court, the State's highest court of justice, not to permit an inappropriate use of the Unreported Opinion by the Court of Special Appeals.

In sum, both Constitutional and Public Policy considerations dictate that this precedent-setting change in the law be addressed by this Court.

Respectfully submitted,

/s/_____

W. Ray Ford
14300 Gallant Fox Lane
Suite 103
Bowie, Maryland 20715
(301) 805-1101

IN THE COURT OF APPEALS OF MARYLAND

JAMES L. HOOPER,

Petitioner,

v.

PERRINO, DOLINSKY, KARESH,WITHROW, JUARBE & BAIER, M.D., P.A.;
SUSAN WITHROW, M.D.;
PASQUAL PERRINO, M.D.;
CHARLES KARESH, M.D.;
HERBERT JUARBE, M.D.;
CAROLYN BAIER, M.D.;
STEVEN DOLINSKY, M.D.;
AVANTI OF THE DISTRICT, INC.;
SANUS CORP. HEALTH SYSTEMS; and
SCOTT ROTEMAN, t/a.,
SCOTT ROTEMAN, M.D., P.C.,

Respondents.

September Term 1997
Petition No. 559

MOTION FOR RECONSIDERATION

Petitioner respectfully moves for reconsideration of this Court's March 11, 1998 denial of his Petition for a Writ of Certiorari.

1. This Court has let stand a ruling that *res judicata* can properly and Constitutionally deny to a non-party, not in privity, its day in court. It has affirmed a ruling that corporate officers and directors (also majority shareholders) may divert to themselves the assets of a corporation, and that such wrong against the corporation may not be remedied through a

stockholder's derivative action brought by a stockholder who previously brought an unsuccessful action alleging fraud against him personally by the other shareholders. That is neither a proper nor a Constitutional application of *res judicata*. It is a determination of issues never litigated, and the denial of the most basic concepts of Due Process to the corporation, a separate person in law.

2. The unreported decision of the Court of Special Appeals is a total departure from all prior law of *res judicata* and Due Process as it relates to *res judicata*. If this Court permits that decision to stand, this case should be remanded to the Court of Special Appeals with directions that it should publish its decision which creates a new rule of law.

Respectfully submitted,

/s/_____

W. Ray Ford
14300 Gallant Fox Lane
Suite 103
Bowie, Maryland 20715
(301) 805-1101
Counsel for Petitioner